BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOY A. UTHOFF Claimant VS. **LAWRENCE MEMORIAL HOSPITAL** Respondent AND **PHICO INSURANCE COMPANY** Insurance Carrier	)	Docket No. 166,198

ORDER

ON the 18th day of October, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated July 25, 1994, and the Award Nunc Pro Tunc, dated July 27, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Gary L. Jordan of Ottawa, Kansas. The respondent and its insurance carrier appeared by and through their attorney, C. Keith Sayler of Topeka, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether claimant's accidental injury arose out of and in the course of her employment.

(2) What is the nature and extent of claimant's injury and disability?

(3) Whether claimant is entitled to 4.71 weeks temporary total disability compensation from the period March 20, 1992 through April 21, 1992.

(4) Whether claimant is entitled to reimbursement for prescriptions, medical mileage and medical treatment incurred but not paid for.

(5) Whether claimant is entitled to future medical treatment.

(6) Whether claimant is entitled to unauthorized medical care.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a nursing secretary for respondent, was injured on March 19, 1992, when she slipped and fell while visiting a friend at Lawrence Memorial Hospital, where she had been employed for five (5) years. Claimant's work location was on the first floor of the hospital with the place of injury being on the second floor of the hospital. Claimant's visit occurred during her lunch break, which claimant was allowed to take anywhere on the hospital premises. The visit by claimant to the second floor was of a personal nature, although the employer was aware of and did allow these visits to occur by employees during their break times.

It is undenied that the claimant's slip and fall occurred on the premises of the respondent during claimant's work hours with the only remaining question being whether the slip and fall constituted an accidental injury arising out of claimant's employment.

K.S.A. 44-501(a) states in part:

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-501(a) states in part:

> "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act."

The phrases "arising out of" and "in the course of" as used in the Workers Compensation Act have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

Here there is no serious dispute that the accident occurred in the course of claimant's employment, occurring during the time she was present on her employer's premises during her lunch break.

The Kansas Supreme Court, in Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), noted that work place hazards must be analyzed by using three general categories of risks: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and, (3) the so-called neutral risks which have no particular employment or personal character.

Those risks falling in the first category are universally compensable; whereas personal risks do not arise out of the employment and are not compensable. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). This situation appears to fall within the boundaries of the neutral risk category.

K.S.A. 44-508(f) makes it clear that the words "arising out of and in the course of employment" as used in the Workers Compensation Act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. The statute goes on to state that an employee shall not be construed as being on the way to assume the duties for employment or having left such duties at a time when a worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

It is clear from the statutory and case language that had claimant entered the premises on her way to her work station and suffered a slip and fall, her injury would have been compensable under the Workers Compensation Act. Likewise, had the claimant concluded her workday and, in proceeding from her work station, while still on the employer's premises, suffered a slip and fall, this injury would have been compensable. The Appeals Board is asked to decide whether an injury suffered while claimant, remaining on the employer's premises, visited a sick friend over her lunch hour, constitutes sufficient deviation from her employment to be considered a risk which is personal to the worker and not compensable. Respondent cites Martin, *supra*, as controlling in this case. The Appeals Board disagrees. In Martin, the claimant, having a long history of back problems, was merely exiting his truck in the employer's parking lot when he experienced a sudden sharp pain in his back and left leg. The Appeals Court found claimant's risk under those circumstances to be a personal risk not associated with his employment. Martin is distinguishable from the case before the Appeals Board. A much more analogous situation is found in Thomas v. Manufacturing Co., 104 Kan. 432, 179 P. 372 (1919). In Thomas, the claimant, a seventeen-year old employee of the respondent, was injured while playing on a drawing truck over her lunch hour. The circumstances in Thomas are more analogous to those at hand. In Thomas, the girls were on their lunch hour and were at liberty to go where they pleased. In Thomas, the conflicting evidence indicated that while the company warned the girls about using the trucks, the practice did exist and the company apparently, to a certain degree, acquiesced to this activity. In the present case,

the visiting of sick friends, while not an employment responsibility, was an activity allowed by the employer and was, to a certain degree, common practice at the hospital.

Injuries have been held to arise out of the employment whenever the result either was or should have been in the contemplation of the employer." Id. at 437.

"It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both." See K.S.A. 44-501(g).

While the workers compensation act is to be impartially applied to both employers and employees once the parties come within the provisions of the act, it is clear from the statutory language that the Legislature intended a liberal interpretation of the laws in order to bring the parties within the provisions of the workers compensation act. The Appeals Board, in applying that liberal interpretation, finds that claimant did suffer accidental injury arising out of and in the course of her employment and as such is entitled to the benefits the workers compensation act provides.

K.S.A. 1992 Supp. 44-510e(a) provides in part:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant has returned to employment with respondent, performing the same duties at a comparable wage. As such, the presumption in K.S.A. 1992 Supp. 44-510e has not been overcome and claimant is entitled to compensation for her functional impairment only.

K.S.A. 1992 Supp. 44-510e(a) states in part:

> "Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

In a commendable display of judicial economy, the attorneys for the claimant and respondent stipulated to the records of Dr. John Wertzberger and Dr. Bruce Toby. Dr. Wertzberger assessed claimant a thirteen percent (13%) permanent partial impairment of function of the whole body. Dr. Toby assessed claimant a nine percent (9%) permanent partial impairment of function to the whole body. In assessing the medical evidence in this case, it is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The Appeals Board, in reviewing the medical reports of Dr. Wertzberger and Dr. Toby, finds no compelling reason to give greater weight to one report over the other. In comparing Dr. Wertzberger's thirteen percent (13%) permanent partial impairment of the body to Dr. Toby's nine percent (9%) permanent partial impairment to the body, the Appeals Board finds claimant has suffered an eleven percent (11%) permanent partial impairment to the body as a whole on a functional basis and awards same.

The records of Dr. Wertzberger and Dr. Toby indicate claimant may be in need of medical treatment in the future. Uncontradicted evidence, which is not improbable or

unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). In following the uncontradicted evidence of the medical experts in this matter, the Appeals Board finds claimant is entitled to future medical treatment upon application to and approval by the Director.

The uncontradicted evidence further supports a finding that claimant was temporarily and totally disabled for 4.71 weeks during the period of March 20, 1992, until her return to work on April 21, 1992, and is entitled to temporary total disability compensation during that time. Claimant is further entitled to reimbursement for $139.57 in medical prescriptions and $118.56 in medical mileage, sums expended by claimant on her own behalf. Claimant is further awarded payment, by the respondent, for medical expense in the amount of $4,435.95 incurred during treatment of her injuries.

AWARD

WHEREFORE, it is the finding, decision and order for the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated July 25, 1994, and the Award Nunc Pro Tunc, dated July 27, 1994, shall be, and hereby are, affirmed and claimant, Joy A. Uthoff, is hereby awarded compensation against the respondent, Lawrence Memorial Hospital, and its insurance carrier, Phico Insurance Company, for 4.71 weeks of temporary total disability compensation at the rate of $229.60 per week, in the sum of $1,081.42, followed by 410.29 weeks compensation at the rate of $25.25 per week, in the sum of $10,359.82, for an 11% permanent partial general body impairment of function, making a total award of $11,441.24.

As of November 30, 1994, there would be due and owing claimant 4.71 weeks temporary total disability compensation at the rate of $229.60 per week in the sum of $1,081.42, followed by 136.29 weeks of permanent partial general body compensation at the rate of $25.25 per week, totalling $3,441.32, making a total due and owing of $4,522.74, which is ordered paid in one lump sum less any amounts previously paid, followed by 274 weeks permanent partial general body compensation at the rate of $25.25 per week in the sum of $6,918.50 to be paid until complete or until further order of the Director.

Further award is made in that claimant is entitled to future medical expense upon proper application to the Director of Workers Compensation.

Claimant is further ordered to be reimbursed for $139.57 for prescriptions paid by claimant and $118.56 for medical mileage paid by claimant, with said reimbursement to come from the respondent and/or respondent's insurance carrier.

Further award is made in that the medical expense incurred by claimant in the amount of $4,435.95 shall be paid by the respondent and/or the respondent's insurance carrier.

Claimant is awarded unauthorized medical up to $350.00 upon presentation of an itemized statement justifying the same.

Claimant's attorney fee contract is hereby approved insofar as it is consistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Appino & Achten Reporting Service	
Transcript of Regular Hearing	$210.10
Braksick Reporting Service	
Deposition of Debbie Gatz	$92.80
Deposition of Mindy Mitchell	$53.20
Deposition of Teresa Craver	$74.80

IT IS SO ORDERED.

Dated this _____ day of December, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
C. Keith Sayler, Topeka, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director